No. 12,153

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, et al.,

Appellees.

Appellant's Reply Brief

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I.

THE FACTS

Appellees say that we have overlooked the rule that conflicts must be resolved in favor of the party successful below and for this reason it is necessary to restate the facts.

We have not overlooked the rule but the rule is only one of two rules. When the question is the sufficiency of the evidence to sustain the judgment conflicts must be resolved for the party successful below. But when the question is the propriety of the charge the appellant who

claims error in giving or refusal of instructions is entitled to present the evidence which supports **his** theory for he is entitled to instructions on so much of his theory of the case as is supported by **any** evidence (*Thomas v. Visalia E. R. Co.,* 169 Cal. 658, 661, 147 Pac. 972; *Scarborough v. Urgo,* 191 Cal. 341, 347, 216 Pac. 584). We stated the evidence for appellees' theory, and argued the sufficiency of the evidence on that. But to orienting our claim of error in the charge we also stated other evidence.

Examination of appellees' statement of the facts shows that we omitted nothing of significance. Appellees have not corrected or undertaken to correct any of our statements. To the contrary, there are matters in appellees' statement which may not seem of great significance as the statement is read, but which go to the heart of their attempt to excuse the conduct of the automobile driver, John, and which call for correction.

The attempt to excuse the driver's conduct is the claim that weather conditions limited and distorted his view in the direction from which the locomotive approached because he looked into the sun in that direction (Appellees' Brief, p. 13). The claim involves the direction of the automobile, the position of the sun and the claimed restriction of vision.

First, the direction of the automobile: Appellees state that Beckwith Road extends in a general **northeasterly** and southwesterly direction (p. 5) and that the automobile, as it approached the track, was going northeasterly (p. 6). This is an attempt to lay a basis for the claim that when John looked 45° to his right, toward the locomotive, he was looking east into the sun. The diagrams, Court's Exhibits 1 and 2 (our brief opposite p. 6; R. 89, 90),

demonstrate that Beckwith Road runs **east** and west. There was no attempt to dispute the accuracy of these diagrams. To the contrary, John the driver testified he "proceeded easterly on Beckwith Road" (R. 102), not "in a northeasterly direction" as stated by appellees.

The sun was several hours above the horizon—at 9:00 a.m. at least half way to the meridian. It was in the sky "at an angle". With reference to the direction in which John was driving it was, so he said, "directly, just about directly east of me, maybe a little bit south" (R. 104). Appellees claim that "the position of the sun as appellee John Martin Souza looked to his right had a tendency to distort his vision." His testimony (R. 105) falls short of this. This is his only testimony on this subject:

> "Q. Was your vision affected with reference to the direction you looked? What I mean by that, was there any difference in looking toward the sun or away from the sun?
>
> A. Well, it **naturally**[1] would distort my vision.
>
> Q. Looking in what direction?
>
> A. **When I looked right directly on the sun.**
>
> Q. When you looked to the left, how about that?
>
> A. The sun wouldn't hinder me when I looked to my left." (R. 105)

When John looked to his right, if he did look to his right, toward the locomotive, **he did not look "right directly on the sun"**. The sun was up in the heavens. When he looked down the track he looked away from it 45° to the left of his line of vision.

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1. He is arguing and reasoning, not stating an observation. He is stating only what anyone knows. If you "look toward the sun" it affects vision.

This matter may be a little one—indeed it is—but it is about the only little thing that is offered to excuse John's conduct.

The second attempt, connected with this, is to make out a mist or haze which limited vision to 600 feet. The testimony by Davis is dealt with in our opening brief (p. 33 note 29) and demonstrates that no mist or haze can provide any excuse for John's conduct. Appellees now repudiate their witness Davis by silently ignoring him. This leaves as the only testimony to support their claim, and the only testimony upon which they rely, the testimony of John Souza and Traffic Officer Hansen.

John Souza's testimony was not that his vision down the track was restricted to 600 feet but only that he could not see "clearly" more than an estimated 600 feet. His testimony was: "There was sort of a haze hanging low and I couldn't see any more than about 200 yards down the track, **got no clear view**" (R. 104). When asked how he fixed the distance, "I just guessed it. That is just an estimation" (R. 144). He claimed the bottom of a band of mist was about 5 feet above the ground (R. 146, 148), said he could see ahead **under** it about 600 feet and when he looked **through** it could see "about the same" (R. 147). If this is to be believed the mist or haze was a negative quantity. On redirect examination his counsel came back to this and in answer to the question how far down the track he "had an **unimpaired** vision" he said he would say he could see "about 600 feet" (R. 157).

Hansen's testimony is referred to for the proposition that the haze was an ordinary haze and limited visibility "from two hundred feet to one thousand feet depending upon what you were looking **toward**" (Appellees' Brief

p. 7). This would leave the impression that Hansen intended to say that if you were looking toward the sun visibility was less than 1,000 feet. Hansen's testimony will not support any conclusion. We quote his full testimony on the subject, given on direct examination as a witness for appellees:

"Q. When you came to the scene of the accident, from what direction did you come?

A. I came from Modesto. That would be traveling in a northerly direction.

Q. Do you recall what kind of a morning this was, that is, whether it was a clear morning or just what the weather conditions were?

A. Yes, it was a characteristic morning for that time of the year. **It was what would ordinarily be considered clear.** There was a light haze hanging in the atmosphere, but nothing that would be considered out of the ordinary.

Q. How far would you say your visibility would extend, having in mind the condition of this light haze that you say was hanging in the atmosphere?

A. It would depend upon what you were looking at. It might extend 200 feet for one object and a thousand feet for another.

Q. That would depend upon the condition of the haze at that particular point, is that right?

A. **It would depend also upon the object that you were looking at, color, shape, size, and so forth.**" (R. 161, 162)

Hansen did not make his testimony on range of visibility depend on geographical direction but on the object looked at. His testimony will not support the proposition that there was atmospheric interference with the visibility. His testimony was that the range of visibility depended "on

the object that you were looking at, color, shape, size, and so forth.'' This, of course, is true in the broadest daylight and states only the very elementary proposition demonstrated in nature in protective coloring of birds and animals and in warfare in uniforms and colors which blend into the surroundings.

Finally, in an offhand way, appellees suggest that the roadway was but two lanes and that there was some other traffic to be expected (Appellees' Brief p. 20). Well, an automobile needs only one lane. Whether there was one or six lanes is beside the point when, as is demonstrated here, the view beyond the lanes and to the right and toward the locomotive was unobstructed. There is no evidence of any other highway traffic. There is not the slightest suggestion that John had his attention distracted for so much as a second by any moving object.

II.

THE AUTOMOBILE DRIVER WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW

This action involves no federal question. Jurisdiction is based on diversity of citizenship. Matters of substantive right are governed by the law of California (*Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L.ed. 1188). The rule of the *Tompkins Case* applies to negligence and contributory negligence—the *Tompkins Case* was such a case—and within the rule the sufficiency of the evidence is a matter of substance governed by State rules (*Stoner v. N. Y. etc. Co.,* 311 U.S. 464, 85 L.ed. 284).

In discussing instructions appellees argue that the automobile driver could assume that those in charge of the

locomotive would obey the law. **This is not the California rule in railroad grade crossing cases.** The cases are cited at p. 31 of our brief. They make clear that the railroad crossing cases are a distinct class; that "a railroad crossing is itself a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company itself to exercise reasonable care." (*Koch v. So. Cal. Ry. Co.,* 148 Cal. 677, 84 Pac. 176.)

> "The rule is simply this: That a railroad crossing from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him upon the assumption that care will be exercised in the operation of the train. * * * 'There are instances where as matter of law it is negligence not to anticipate negligence in others.'" (*Hutson v. So. Cal. Ry. Co.,* 150 Cal. 701, 89 Pac. 1093.)[2]

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2. The court added:

"As, for instance, it is well settled in the Federal Courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals. This is in accord with the doctrine of the Supreme Court of the United States as laid down in *Railroad Co. v. Houston,* 95 U.S. 697, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger.'"

In *Griffin v. San Pedro R. Co.,* 170 Cal. 772, 151 Pac. 282, the court said the traveler could not rely upon "a custom or even a duty enjoined by law, to give signals."

Larrabee v. W. P. Ry. Co., 173 Cal. 743, 161 Pac. 257, reinvestigated the rule *de novo* and reaffirmed the rule established by the California cases. It expressly disapproved *Strong v. Sacramento etc. Co.,* 61 Cal. 326, relied upon by appellees. The court said:

> "The statements in *Strong v. Sacramento & Placerville R. R. Co.,* 61 Cal. 326, and in *Whalen v. Arcata & Mad River R. Co.,* 92 Cal. 669 [88 Pac. 833], to the effect that the deceased had the right to rely upon the 'performance by those on the locomotive of every act imposed by law upon them when approaching a crossing' cannot be considered to be the law of this state as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see."

The California cases were reviewed, the *Griffin Case,* note 2 above, was quoted with approval and the language from the *Larrabee Case,* disapproving the *Strong Case,* was quoted with approval in *Koster v. S. P. Co.,* 207 Cal. 753, 764, 765, 279 Pac. 788. See also reviewing the California cases, and holding that "the negligence of the railroad company in failing to give crossing signals required by law does not justify the person crossing the track in omitting precautions which would otherwise be required of him", the decision of this court in *S. P. Co. v. Day,* 38 F2d 958.

Except for the repudiated *Strong Case* none of the California cases cited by appellees were railroad crossing cases. *Harris v. Johnston,* 174 Cal. 55, 161 Pac. 1155; *White v. Davis,* 103 Cal. App. 531, 545, 284 Pac. 1086;

Dickinson v. Pac. Greyhound Lines, 55 CA2d 824, 131 P2d 401, are all highway accident cases—motor vehicle collisions or motor vehicles striking a pedestrian. None remotely suggests modification of the railroad crossing rule. There is no element in any comparable with the elements present in a railroad crossing case, i.e., a track which is itself a warning of danger that heavy trains traveling at high speed and which cannot be stopped as can an automobile may approach at any time and the consequent settled rule of law that the railroad operation has the right of way to which the automobile is bound to yield (see our brief pp. 20, 21).

While this bears on the question of error in instructions it is worth noticing here that it is equally well established that the rule is just the contrary for the operators of the train—they are entitled to assume the highway traveler will keep out of the way of the train whether signals have been sounded or not. Appellees' argument in this regard is no more than a bland disregard of the settled California rule. The cases are set out in our brief, pp. 47 and following.

Nothing better could support the claim of Souza's contributory negligence as matter of law than an examination of the cases appellees cite for the proposition that this question is for the jury. The unusual and extraordinary facts of each as compared to this case of a wide open country crossing in daylight, and the difficulty that the courts had in finding ground in those cases for letting the case go to the jury, speak volumes.

In California there is a settled distinction between "guarded crossings" where the railroad has installed fixed protection which fails to operate—a wig-wag or

other automatic signal that does not work, gates that are not closed or a flagman who is not functioning properly[3] —and an unguarded country crossing as here. The court first made this distinction clear in *Gregg v. W. P. R. Co.*, 193 Cal. 212, 217, 223 Pac. 546, holding that the railroad, by installing protection, cannot encourage the public to relax in reliance on the protection; can not, in effect, invite the traveler onto the crossing by failing to have the protection work and then hold the traveler to the care required as at an unguarded country crossing where there was no element of entrapment. This distinction has been consistent in the California cases.[4] Even so, the relaxed rule is applied only where there are other elements excusing want of care.[5]

We now turn to the cases appellees cite.

Peri v. L. A. Junction Ry. Co., 22 C2d 111, 137 P2d 441, was a very peculiar guarded crossing case. The plaintiffs were passengers in an automobile operated by one Guida. It was a dark night, there was no artificial light, there was a heavy fog and visibility was limited to from 5 to 10 feet for dark objects and from 35 to 50 feet for lighted

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3. And even here there is a limit as this court demonstrated in *S. P. Co. v. Day,* above.

4. See *Marino v. S. P. Co.,* 201 Cal. 392, 257 Pac. 74; *Crawford v. S. P. Co.,* 3 C.2d 427, 45 P.2d 183; *Sheets v. S. P. Co.,* 212 Cal. 509, 299 Pac. 71; *Vaca v. S. P. Co.,* 91 Cal. App. 470, 267 Pac. 346.

5. For cases holding the driver was guilty of contributory negligence in spite of the failure of crossing signals to operate see in addition to *S. P. Co. v. Day* above, *Koch v. So. Cal. Ry. Co.,* 148 Cal. 677, 84 Pac. 176; *Jones v. S. P. Co.,* 34 Cal. App. 629, 168 Pac. 586; *Gundry v. Atchison etc. Co.,* 104 Cal. App. 753, 286 Pac. 718.

objects. The crossing protection was not operating. In addition, since the plaintiffs were passengers and Guida's negligence was not imputed to them, it was necessary to make out not only that Guida was negligent but that his negligence was the sole proximate cause of the accident. It was held that this double burden had not been carried as matter of law. It is difficult to see how the court could have held differently. The case is no authority here.

Toschi v. Christian, 24 C2d 354, 149 P2d 848, was another guarded crossing case with additional elements. The city street, on which the truck was approaching until just before it turned onto the track, and the track were so located that the backing locomotive was coming from behind the truck driver. In addition there was evidence that the flagman on the crossing not only was not signalling the approach of the locomotive but with a mirror was shining the sun's reflection in the eyes of the truck driver.

Hoffman v. S. P. Co., 101 Cal. App. 218, 281 Pac. 681, reversed a judgment for the plaintiff. As in the *Toschi Case* until just before the automobile turned onto the track "the train was approaching from their rear." There was a "dense fog". When the automobile was 5 or 6 feet from the nearest rail "suddenly the headlight of the approaching engine appeared through the fog about 100 feet away. The train was rapidly bearing down on them."

In *Nelson v. S. P. Co.,* 8 C2d 648, 67 P2d 682, a woman driver approached five sets of tracks, stopped 8 feet from the first, saw nothing to her right and saw a freight train to her left. She waited for this to pass and then started across. As she crossed she saw a locomotive operating to her left and it necessarily required her attention. In addition, the crossing was rough. In the circumstances her

conduct was for the jury "in the presence of what she considered to be a definite hazard to her left and in traversing a difficult crossing".

In *Pokora v. Wabash Ry. Co.,* 292 U.S. 98, 78 L.ed. 1149, the view of the driver of the motor vehicle, in the direction from which the train came, was blocked by standing cars on the next track so when his vehicle moved far enough for him, behind the wheel, to see along the track, the front of his vehicle, out in front of him, was already in the path of the "overhang" of the train which struck it.

In *Grand Trunk Ry. Co. v. Ives,* 144 U.S. 408, 36 L.ed. 485, the accident happened at a city crossing where the tracks and road were so located that the tracks curved "away from a person coming down the Holden Road." There were "trees and a willow, a short distance from the line of the right of way" so that "it was not until a traveler was within 15 or 20 feet of the track, and then going up the grade, that he could get an unobstructed view". One witness testified it was necessary to be within 8 feet of the track. The horse and buggy were driven on the track while the ability to hear was still interfered with by a train that had just passed and apparently the driver's attention was on this train at the time of the accident.

The court in *Chesapeake & O. Ry. Co. v. Waid,* 25 F2d 366 (CCA 4) for the facts, refers to its earlier opinion in 14 F2d 90. From the two opinions it appears that the traveler was struck by cars which were being shoved without light or signal. The driver testified "that it was so dark at the time of the collision that he could not see the approaching cars"; that the crossing was narrow and difficult so that "you had to hit it just right or the wheels would miss it and go down between the rails". In addition

there was a locomotive with a lighted headlight to his left (the cars came from the right) to which he was required to give, and did give, attention. The holding adds nothing to the *Nelson Case* above. The court which decided the *Waid Case* declined to follow it in *Kilmer v. Norfolk & W. Ry. Co.,* 45 F2d 532 (CCA 4—cert. den. 283 U.S. 824, 75 L.ed. 1438).

The significant elements, excusing failure of the driver to see the approaching train, in each of the cases cited by appellees, are wanting in this case. This was an unguarded crossing. There was no element of entrapment. The defendant did nothing to induce the driver to relax his vigilance. There was no highway traffic which required the driver's attention or which distracted him even if it did not require his attention. There was no other railroad traffic. There was no possibility of other traffic. This was a single track main line railroad. There was nothing in the physical condition of the crossing that required exceptional care or attention in order to operate over the crossing.

Whatever the rule may be in other jurisdictions it is the rule in California that it was the duty of the driver not only to look once but to continue looking. (Our brief p. 26 and cf. *S. P. Co. v. Day,* above.)

If the plaintiff's story is to be believed he stopped 20 feet from the track, looked to his right and left, started on and never looked again. As he started he was driving practically head-on into the approaching locomotive. It is difficult to know how he avoided seeing it. He was in low gear and claims to have been going only 3 or 4 miles an hour. In low gear he readily could have increased his speed to at least 10 or 15 miles an hour. At 3 or 4 miles an hour he could have stopped instantly. At any time

from the time he started, 20 feet from the track, until he was on the track, he could have stopped to clear the locomotive or increased his speed to cross ahead of it. Certainly while he was still in control of his own fate the locomotive was plainly within his view. On his own testimony he had a clear view down the track for 600 feet. As we pointed out in our opening brief, his witness Davis had no difficulty in seeing it at a distance of over 2,000 feet.

III.

THE NEGLIGENCE OF THE DRIVER IS IMPUTED TO HIS FATHER AND BROTHER

If John Souza was guilty of negligence as matter of law then, as matter of law, that negligence is imputed to his father. (Our brief p. 39.) Appellees do not even attempt to present an argument to the contrary.

If John Souza was guilty of negligence then it was a matter of fact for the jury, to be submitted under appropriate instructions, whether John and his brother Edward were so engaged in a joint venture that the negligence of John is to be imputed to Edward.

John and Edward were not on a pleasure trip. The object of the trip was distinctly business. That business had been discussed. Edward was not going as a casual observer. That he had not agreed yet to go into the venture is beside the point. John himself had not yet agreed to anything. All three, as a business matter, were proceeding to determine whether the venture should be undertaken. John was no more committed than the others.

The family relation is not controlling as a matter of law but it is a matter of fact that cannot be disregarded. Indeed, without cooperation of some member of his family, John, a minor, could not have entered into the venture.

For a court to rule as matter of law that in such circumstances there is no ground for inference that Edward had as much interest in the business possibilities as his father and brother, is to rule that juries cannot apply common sense or draw on the common fund of knowledge of ordinary family action in the course of ordinary family affairs. In such circumstances there was no need for any agreement for right to direct and govern the conduct of the operation of the automobile. The parties had agreed to go to a definite place in a definite way for a definite business purpose—the investigation of a business possibility. Edward would have been within his rights in objecting if John had turned aside for another purpose. There was no occasion for an agreement to share in profits or in losses. The venture had not progressed that far. Its business purpose was to determine what, as a business matter, the parties would do. There was a complete community of interests in the object of the undertaking, i.e., to determine whether the family, whatever outward form the transaction might take, should stock a ranch with cattle. It certainly would not take the form of a transaction by John alone. He had neither the money nor the legal capacity.

In *Heilman v. E. P. Ry.,* 10 Cal. App. 397, 102 Pac. 15, it was enough that the driver and the person riding with him were associated together in the transfer business. Closer and stronger is *Green v. So. Cal. Ry Co.,* 138 Cal. 1, 70 Pac. 926. A mother and daughter were driving in a small market wagon. They were taking their produce to market and were to buy groceries. The wagon belonged to the father and husband. The daughter was driving. The mother and daughter were not members of the same house-

hold although they lived at the same place. The mother was responsible for the negligence of the daughter. There was no showing that they jointly owned the produce to be sold or that they were not to buy their groceries separately for their separate establishments.

A monetary interest is not a prerequisite if there is a common interest. In *Collins v. Graves,* 17 CA2d 288, 61 P2d 1198, two peace officers were riding in an automobile. The only common interest was that they both reach Sacramento, one on one mission and the other on another.

Indeed, community of interest in the ordinary business sense of the term is not necessary at all. Community of interest in making a charitable donation is enough. (*Coleman v. Calif. etc. Church,* 27 CA2d 579, 81 P2d 469.) Certainly Edward had as much interest in the common welfare of the family as the parties in the *Coleman Case* had in the welfare of the more distant and looser organization, the Church.

IV.

THERE WAS ERROR IN THE CHARGE

What has been said sufficiently disposes of appellees' argument directed to errors in the charge, that it was proper to charge that the driver John could assume there would be no negligence in the operation of the locomotive and that it was proper to deny an instruction that until put on notice to the contrary the railroad men could assume that the automobile would stay clear of the train.

No real argument is presented to meet the claims of the other errors in the charge specified. We rest on our opening brief. Of course, if we are correct in the positions heretofore taken as to the conduct of the driver it will be unnecessary for the court to consider the specified errors in the charge.

CONCLUSION

Plaintiffs tried their case as fully as they could. The negligence of John Souza, the driver of the automobile, is apparent from his own testimony. New trials are not awarded to permit a plaintiff-witness to repudiate his own testimony. A motion for a directed verdict and a motion for judgment notwithstanding the verdict having been made, the judgment so far as the driver John Souza is concerned, and the judgment for damages for the death of the father, should be reversed with direction to enter judgment for the defendant. So far as the case for damages for the death of the brother Edward is concerned the reversal should be for a new trial so that the case may be tried and submitted under appropriate instructions as to the conduct of the driver and so as to submit to the jury whether from all the circumstances the inference should be drawn that the brother Edward had as much business interest in the possible venture which all three had in mind, as to the father and the driver.

Dated at San Francisco, California, September 11, 1949.

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